



DESAUTEL LAW

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MAY 13 2019
OFFICE OF THE REGIONAL ADMINISTRATOR

May 8, 2019

Via Certified Mail

James Crowley, Esq.
Conservation Law Foundation
235 Promenade Street.
Suite 560, Mailbox 28
Providence, RI 02908

**RE: CLF'S NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT UNDER THE
CLEAN WATER ACT – YW Investments, LLC; Yard Works, Inc.**

Dear Attorney Crowley,

This office was retained to respond to your Notice of Violations and Intent to File Suit under the Clean Water Act issued to YW Investments, LLC and Yard Works, Inc., dated April 15, 2019 ("Notice").

In its Notice, CLF claims that YW Investments, LLC and/or Yard Works, Inc.'s (collectively "Yard Works") activities at 301 Warwick Avenue, Cranston, RI (the "Property"), has resulted in discharges and is currently discharging pollutants via stormwater conveyance to the Pawtuxet River. CLF alleges that Yard Works is engaged in industrial activity; a "construction sand and gravel and concrete facility (SIC 1442 and SIC 3271)." As a result, CLF contends that a Rhode Island Pollution Discharge Elimination System ("RIPDES") permit is necessary for the Property.

For the reasons discussed below, CLF's Notice is factually inaccurate, legally misplaced, and ultimately defective. CLF must immediately provide this office with a formal withdrawal of its Notice.

**YARD WORKS HAS NOT ENGAGED AND IS NOT ENGAGING IN
INDUSTRIAL ACTIVITIES AT THE PROPERTY**

Simply stated, Yard Works does not conduct any industrial activities at the Property. A review of the corporate filings on record with the Rhode Island Secretary of State's Office show that Yard Works' business on the Property is reported as "Landscaping, Masonry" and "Lessors of Residential Buildings and Dwellings." The associated NAICS codes are 238910 and 531110, respectively, with relevant definitions as follows:

"Definition of NAICS Code 238910: This industry comprises establishments primarily engaged in site preparation activities, such as excavating and grading, demolition of buildings and other structures, and septic system installation."
(<https://classcodes.com/lookup/naics-code-238910/>)

"Definition of NAICS Code 531110: This industry comprises establishments primarily engaged in acting as lessors of buildings used as residences or dwellings, such as single-family homes, apartment buildings, and town homes."
(<https://classcodes.com/lookup/naics-code-531110/>)

It is obvious that CLF representatives have never visited the Property because the Notice makes factual conclusions that are not true. Yard Works is not undertaking and has never undertaken any "industrial activity" as contemplated by 40 CFR §122.26. Yard Works does not engage in activities such as "storing, moving, and processing sand, gravel and concrete, and other materials outside or otherwise exposing them to the elements; operating and storing heavy machinery and equipment outdoors; and driving vehicles on and off the Facility thereby tracking pollutants off-site." Notice, page 3.

As no industrial activity is occurring on the Property, there is also no "pollutant" being discharged from the Property, as defined in 33 USC §1362(12). "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 USC §1362(6). Yard Works, therefore, is not in violation of any effluent standard or limitation under 33 USC §1342(p). There is no case and controversy for a citizen suit; there is no "violation of...an effluent standard or limitation under this chapter." 33 U.S.C §1365(a).

**THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
RECENTLY DETERMINED THAT THE PROPERTY
DOES NOT REQUIRE A STORMWATER PERMIT**

The Rhode Island Department of Environmental Management ("RIDEM") recently and formally concluded that RIDEM "evaluated whether Yard Works required stormwater permit when we investigated complaints involving alleged wetland violations at the property. We determined that no stormwater permit was required." See attached email from RIDEM, dated April 26, 2019.

RIDEM's determination is based on the following findings:

- “Yard Works is primarily (if not entirely) involved with the storage and movement of earthen materials such as soil and sand and storage of plant materials such as shrubbery and turf.
- On occasion a portable soil screening machine is operated onsite.
- The property is used as a base for landscaping services done elsewhere.
- The [NAICS] code that Yard Works listed with the Secretary of State’s Office is 238910, which is defined as “earth moving and land clearing for all types of sites”
- Based on DEM’s inspections we were satisfied that the description listed with the Secretary of State is accurate.
- The definitions of SIC code 3271 (Concrete Block and Brick) and SIC code 1442 (Construction Sand and Gravel) do not accurately describe Yard Works activity at the property based on our observations.
- There was no evidence that the stormwater from the property is contributing to a violation of a water quality standard or is a significant contributor of pollutants to waters of the State.”

See attached email from RIDEM, dated April 26, 2019.

RIDEM experts actually visited the Property and conducted a customary site visit and investigation prior to rendering the above findings. As the delegated state agency under the Clean Water Act, RIDEM has ultimate authority in Rhode Island to determine coverage under its RIPDES program. Since RIDEM’s opinion is that no stormwater permit is required for the Property, any claim brought by CLF under the RIPDES program has no merit.

CLF’S NOTICE IS DEFECTIVE

Under the heading of “ACTIVITIES ALLEGED TO BE VIOLATIONS,” your Notice cites a section of 40 CFR §122.26 that does not apply to Yard Works. Page 3 of the Notice states that “Yard Works has engaged and continues to engage in ‘industrial activities,’ and its operations fall under SIC 1442 (sand and gravel) and SIC 3271 (concrete), within the meaning of 40 CFR §122.26(b)(14)(vi).” (*citation omitted*). However, 40 CFR §122.26(b)(14)(vi) states:

“(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093.” 40 CFR §122.26(b)(14)(vi).

It would appear that 40 CFR §122.26(b)(14)(vi) has been referenced mistakenly in the Notice. This citation is not only erroneous, but makes the Notice defective and is fatal to the requirements of 33 USC §1365(b).

The Notice further states that Yard Works “uses water in its industrial processes, including but not limited to washing gravel and crushed stone and spraying on rock crushing and sorting machinery” such that “process wastewater” is generated on the Property. Notice, page 4.

Under 33 USC §1365(b), no action may be commenced under 33 USC §1365(a) prior to sixty days after a plaintiff has given notice of the alleged violation to the alleged violator. *Id.* CLF is alleging, in the Notice, that Yard Works is engaged in recycling materials, salvage operations, and automobile junkyards, and that process wastewater is generated from site activities.

To date, my client has not received proper or adequate notice of its alleged violations. The facts contained in the Notice do not provide Yard Works with adequate notification of a violation. As no violations actually exist, even issuing another notice would be futile.

**UNDER THESE FACTS, ANY CLAIM BROUGHT PURSUANT TO CLF'S NOTICE
WOULD BE FRIVOLOUS**

Rule 11(b) of the Federal Rules of Civil Procedure states, in pertinent part, that any pleading must be certified, by the attorney, that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

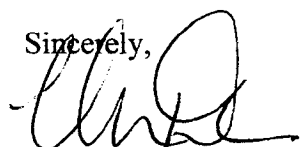
- "1. It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- "2. The claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law."
- "3. The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery..."

As outlined herein, the allegations contained in the CLF Notice are without merit, factually. Resultantly, pursuing a federal lawsuit against my client would be frivolous in nature and any such pursuit would necessarily result in a motion for Rule 11(c) sanctions, with this correspondence attached.

For the reasons discussed herein, CLF's Notice is factually inaccurate, legally misplaced, and ultimately defective. My client anticipates an immediate and formal withdrawal of CLF's intention to file suit as outlined in its Notice.

Please direct any questions to my attention.

Sincerely,



Marisa Desautel

cc: Andrew Wheeler, Administrator
Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W
Washington, DC 20460

Deborah Szaro, Acting Regional Administrator
Environmental Protection Agency, Region 1
5 Post Office Square- Suite 100
Boston, MA 02109

Janet Coit, Director
Rhode Island Department of Environmental Management
235 Promenade Street
Providence, RI 02908

ec: Kevin Fox
Rick Carlone

PRODUCED FROM CLIENT RECORDS

From: Chopy, David (DEM) <david.chopy@dem.ri.gov>
Date: Fri, Apr 26, 2019 at 4:16 PM
Subject: CLF Notice of Intent to Sue
To: yardworksri@gmail.com <yardworksri@gmail.com>
Cc: Hogan, Patrick (DEM) <patrick.hogan@dem.ri.gov>, Peltier, Karen (DEM) <karen.peltier@dem.ri.gov>, Macari, Ralph (DEM) <ralph.macari@dem.ri.gov>

Ms. Ciesynski and Mr. Fox, I am responding to the email that you sent to Ralph Macari regarding the above matter. The DEM's Office of Compliance and Inspection evaluated whether Yardworks required a stormwater permit when we investigated complaints involving alleged wetland violations at the property. We determined that no stormwater permit was required.

The findings that led to this determination were as follows:

- Yardworks is primarily (if not entirely) involved with the storage and movement of earthen materials such as soil and sand and storage of plant materials such as shrubbery and turf
- On occasion a portable soil screening machine is operated onsite
- The property is used as a base for landscaping services done elsewhere
- The SIC code that Yardworks listed with the Secretary of State's Office is 238910, which is defined as "earth moving and land clearing for all types of sites"
- Based on the DEM's inspections we were satisfied that the description listed with the Secretary of State is accurate
- The definitions for SIC code 3271 (Concrete Block and Brick) and SIC code 1442 (Construction Sand and Gravel) do not accurately describe Yardworks activity at the property based on our observations.
- There was no evidence that the stormwater from the property is contributing to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the State

If you have any questions, please let me know.

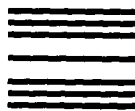


David E. Chopy, Administrator
Rhode Island Department of Environmental Management
Office of Compliance and Inspection
235 Promenade Street, Suite 220
Providence, RI 02908
(401) 222-4700 ext. 7400
(401) 222-3811 fax
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<http://www.dem.ri.gov>

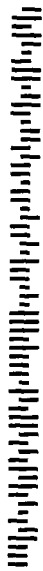


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